OFFICE OF THE ATTORNEY GENERAL · STATE OF TEXAS
JOHN CORNYN

November 26, 2002

Mr. Jim B. Simpson
Assistant County Attorney
Johnson County Attorney's Office
2 North Main Street
Cleburne, Texas 76031

OR2002-6759

Dear Mr. Simpson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 172863.

The Johnson County Judge (the "county") received a request for "any and all official or unofficial sexual harassment complaints filed against any Johnson County Commissioner from Jan. 2, 2001 to September 5, 2002." You claim that the requested information is excepted from disclosure under sections 552.102, 552.107, 552.108, 552.109, and 552.111 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

Although you also contend that portions of the submitted information are excepted from required public disclosure pursuant to sections 552.101 and 552.103 of the Government Code, we note that you did not raise these arguments within the initial ten business days following the county's receipt of the current records request. Normally, a governmental body must raise an otherwise applicable exception to required public disclosure within the ten business days following the governmental body's receipt of an open records request. *See* Gov't Code § 552.301(a). This office will not consider an exception raised after the initial ten days unless there exists a compelling reason for doing so. Open Records Decision No. 515 at 6 (1988). Section 552.103 is designed to protect the government's interests, and thus, the existence of this exception by itself does not demonstrate a compelling interest to withhold the information. *See* Open Records Decision No. 473 at 2 (1987) (discretionary exceptions under the Public Information Act can be waived). Accordingly, we do not

address the applicability of section 552.103 in this instance. However, the application of section 552.101 may provide such a compelling reason. Therefore, we will address your argument under section 552.101 with respect to the submitted information.

Initially, we note that the submitted information includes information that is subject to section 552.022. Section 552.022(a) enumerates categories of information that are public information and not excepted from required disclosure under chapter 552 of the Government Code unless they are expressly confidential under other law. The information that you submitted to us for review consists of a completed report or investigation, which falls into one of the categories of information made expressly public by section 552.022. *See* Gov't Code section 522.022(a)(1). Section 552.022(a)(1) states that a completed report, audit, evaluation, or investigation made of, for, or by a governmental body is expressly public unless it is excepted under section 552.108 of the Government Code or is expressly confidential under other law. Sections 552.107, 552.109, and 552.111 of the Government Code are discretionary exceptions to disclosure that protect the governmental body's interests and are therefore not other law that makes information expressly confidential for purposes of section 552.022(a). *See* Open Records Decision Nos. 630 at 4-5 (1994) (governmental body may waive statutory predecessor to section 552.107), 473 (1987) (governmental body may waive section 552.111); *see also* Open Records Decision No. 665 at 2 n.5 (2000) (discretionary exceptions generally). However, the attorney-client privilege and work product privilege are also found in Rule 503 of the Texas Rules of Evidence and Rule 192.5 of the Texas Rules of Civil Procedure, respectively. Recently, the Texas Supreme Court held that "[t]he Texas Rules of Civil Procedure and Texas Rules of Evidence are 'other law' within the meaning of section 552.022." *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001). We note that the Supreme Court did not hold that the Texas Disciplinary Rules of Professional Conduct are "other law" within the meaning of section 552.022. Thus, we will not consider your arguments under the Disciplinary Rules. *See also* Open Records Decision Nos. 658 at 4 (1998) (statutory confidentiality provision must be express and cannot be implied), 478 at 2 (1987) (language of confidentiality statute controls scope of protection), 465 at 4-5 (1987) (statute explicitly required confidentiality).

Section 552.108 of the Government Code excepts from disclosure certain records of law enforcement agencies and prosecutors. Section 552.108 applies only to records created by an agency, or a portion of an agency, whose primary function is to investigate crimes and enforce criminal laws. *See* Open Records Decision Nos. 493 (1988), 287 (1981). Section 552.108 generally does not apply to records created by an agency whose chief function is

essentially regulatory in nature. Open Records Decision No. 199 (1978). An agency that does not qualify as a law enforcement agency may, under certain limited circumstances, claim that section 552.108 protects records in its possession. *See, e.g.,* Attorney General Opinion MW-575 (1982); Open Records Decision Nos. 493 (1988), 272 (1981). In this case, you state that the records at issue were created by the county attorney's office. You do not inform us that the county attorney's primary function is to investigate crimes and enforce criminal laws. You do state that the Johnson County District Attorney's Office (the "district attorney") also conducted an investigation into this matter. However, you do not provide us with any representation from the district attorney that release of the information here at issue would in any way interfere with the detection, investigation, or prosecution of crime. *See* Open Records Decision No. 372 at 4 (1983) (law enforcement exception may be invoked by any proper custodian of information relating to an incident allegedly involving criminal conduct that remains under active investigation or prosecution). Therefore, we find that in this instance section 552.108 is not applicable to the submitted information.

An attorney's work product is confidential under Rule 192.5. Work product is defined as

> (1) material prepared or mental impressions developed in anticipation of litigation or for trial by or for a party or a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents; or
>
> (2) a communication made in anticipation of litigation or for trial between a party and the party's representatives or among a party's representatives, including the party's attorneys, consultants, sureties, indemnitors, insurers, employees, or agents.

Tex. R. Civ. P. 192.5(a). Accordingly, in order to withhold attorney work product from disclosure under Rule 192.5, a governmental body must demonstrate that the material, communication, or mental impression was created for trial or in anticipation of litigation. *Id.* To show that the information at issue was created in anticipation of litigation, a governmental body must demonstrate that 1) a reasonable person would have concluded from the totality of the circumstances surrounding the investigation that there was a substantial chance that litigation would ensue, and 2) the party resisting discovery believed in good faith that there was a substantial chance that litigation would ensue and conducted the investigation for the purpose of preparing for such litigation. *See National Tank v.*

Brotherton, 851 S.W.2d 193, 207 (Tex. 1993). A "substantial chance" of litigation does not mean a statistical probability, but rather "that litigation is more than merely an abstract possibility or unwarranted fear." *Id.* at 204. Information that meets the work product test is confidential under rule 192.5 provided the information does not fall within the purview of the exceptions to the privilege enumerated in Rule 192.5(c). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ). Based upon your arguments and our careful review of the submitted documents, we find that the information that we have marked is privileged pursuant to rule 192.5. Thus, the county may withhold the information in Exhibits 1, 3, 4, and 5, under Texas Rule of Civil Procedure 192.5.

You also argue that a portion of the submitted information is confidential under the attorney-client privilege. The attorney-client privilege is found in Rule 503 of the Texas Rules of Evidence. Rule 503(b)(1) provides:

> A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client:
>
> > (A) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
> >
> > (B) between the lawyer and the lawyer's representative;
> >
> > (C) by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
> >
> > (D) between representatives of the client or between the client and a representative of the client; or
> >
> > (E) among lawyers and their representatives representing the same client.

A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal

services to the client or those reasonably necessary for the transmission of the communication. Tex. R. Evid. 503(a)(5).

Accordingly, in order to withhold attorney-client privileged information from disclosure under Rule 503, a governmental body must 1) show that the document is a communication transmitted between privileged parties or reveals a confidential communication; 2) identify the parties involved in the communication; and 3) show that the communication is confidential by explaining that it was not intended to be disclosed to third persons and that it was made in furtherance of the rendition of professional legal services to the client. Upon a demonstration of all three factors, the document containing privileged information is confidential under Rule 503 provided the client has not waived the privilege or the document does not fall within the purview of the exceptions to the privilege enumerated in Rule 503(d). *Pittsburgh Corning Corp. v. Caldwell*, 861 S.W.2d 423, 427 (Tex. App.–Houston [14th Dist.] 1993, no writ).

After reviewing your arguments and the information submitted to this office, we conclude that you have failed to demonstrate that the information at issue contains entries that are confidential communications made for the purpose of facilitating the rendition of professional legal services to the client. Therefore, the remaining submitted information in Exhibit 2 may not be withheld from public disclosure under Rule 503.

You argue that the remaining submitted information is excepted from disclosure under section 552.102 of the Government Code. Section 552.102 excepts from disclosure "information in a personnel file, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." Gov't Code § 552.102(a). In *Hubert v. Harte-Hanks Texas Newspapers*, 652 S.W.2d 546 (Tex. App.—Austin 1983, writ ref'd n.r.e.), the court ruled that the test to be applied to information claimed to be protected under section 552.102 is the same as the test formulated by the Texas Supreme Court in *Industrial Foundation* for information claimed to be protected under the doctrine of common-law privacy as incorporated by section 552.101 of the Act.[1] *See Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 683-85 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977). Accordingly, we will consider section 552.101 and section 552.102 together.

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[1]Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision."

The *Industrial Foundation* court stated that information is excepted from disclosure if (1) the information contains highly intimate or embarrassing facts the release of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. 540 S.W.2d at 685. In *Morales v. Ellen,* 840 S.W.2d 519 (Tex. App.--El Paso 1992, writ denied), the court addressed the applicability of the common-law privacy doctrine to files of an investigation of allegations of sexual harassment. The investigation files in *Ellen* contained individual witness statements, an affidavit by the individual accused of the misconduct responding to the allegations, and conclusions of the board of inquiry that conducted the investigation. *Ellen*, 840 S.W.2d at 525. The court ordered the release of the affidavit of the person under investigation and the conclusions of the board of inquiry, stating that the public's interest was sufficiently served by the disclosure of such documents. *Id.* In concluding, the *Ellen* court held that "the public did not possess a legitimate interest in the identities of the individual witnesses, nor the details of their personal statements beyond what is contained in the documents that have been ordered released." *Id.*

Because there is no adequate summary of the investigation, the county may not withhold the requested information under section 552.101 or section 552.102. However, based on *Ellen*, the county must withhold the identities of the victim and the witnesses. We have marked the information in Exhibit 2 that must be withheld under section 552.101 in conjunction with common-law privacy.

In summary, the county may withhold the information in Exhibits 1, 3, 4, and 5 under Texas Rule of Civil Procedure 192.5. We have marked the information in Exhibit 2 that must be withheld under section 552.101 in conjunction with common-law privacy. The remaining submitted information must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days.

Id. § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this

ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

Cindy Nettles
Assistant Attorney General
Open Records Division

CN/jh

Ref: ID# 172863

Enc. Submitted documents

c: Ms. Jewel Klennert
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(w/o enclosures)